

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

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| IN RE: RURAL IOWA INDEPENDENT TELEPHONE ASSOCIATION AND IOWA TELECOMMUNICATIONS ASSOCIATION; ALPINE COMMUNICATIONS, L.C., ET AL.; AND COON VALLEY COOPERATIVE TELEPHONE ASSOCIATION, INC., ET AL. | DOCKET NOS. SPU-04-3 SPU-04-5 SPU-04-6 |
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ORDER DENYING MOTIONS TO RECONSIDER

(Issued June 21, 2004)

On May 12, 2004, the Wireless Coalition for Intermodal Portability (Wireless Coalition) filed with the Utilities Board (Board) a "Motion to Reconsider 180-day Trigger Date" and a "Motion to Reconsider the Temporary Stay or, Alternatively, to Lift in Part the Temporary Stay" in this docket. On May 17, 2004, Wireless Coalition filed supplemental authorities in support of its motions to reconsider.

**WIRELESS COALITION'S MOTION TO RECONSIDER THE 180-DAY
TRIGGER DATE**

Wireless Coalition seeks reconsideration of the Board's decision that the 180-day review period in these consolidated dockets did not start until April 9, 2004, when the various requests for suspension were made complete. In support of its motion to reconsider the 180-day trigger date, Wireless Coalition asserts that federal law is clear with respect to the time allowed for processing a request for suspension or

modification of number portability obligations. Wireless Coalition cites 47 U.S.C. § 251(f)(2), which provides that "[t]he state commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition." Wireless Coalition contends that the triggering date for the 180-day time limit should begin on February 18, 2004, the date on which the initial petition was filed. Wireless Coalition argues that the Board's request for additional information in its March 4, 2004, order and the consolidation of dockets do not change the time requirement of 47 U.S.C. § 251(f)(2).

On May 25, 2004, Iowa Telecommunications Association (ITA) and Rural Iowa Independent Telephone Association (RIITA) filed a joint response to Wireless Coalition's motion to reconsider the 180-day trigger date. Also on May 25, 2004, Alpine Communications, L.C., et al. (Alpine Companies), and Coon Valley Cooperative Telephone Association, Inc., et al. (Coon Valley Companies),¹ filed a joint response to the Wireless Coalition motion. In response to the motion, the Petitioners assert that the Board acted within its authority to request additional information before deeming the petition complete and setting the 180-day trigger date as the date a complete petition was received.

The Board will deny Wireless Coalition's motion to reconsider the 180-day trigger date. The initial petition filed by ITA and RIITA on February 18, 2004, was

¹ ITA, RIITA, Alpine Companies, and Coon Valley Companies shall be collectively referred to as "the Petitioners."

incomplete, as described in the Board's March 4, 2004, order. The FCC requires that a state commission act upon any petition to suspend or modify number portability obligations within 180 days after receiving a petition. The Board cannot act appropriately on an incomplete petition. Reasonable time was provided to ITA and RIITA to perfect the petition and the Board received a completed petition on April 9, 2004. Pursuant to 47 U.S.C. § 251(f)(2), the Board shall act upon this petition within 180-days of April 9, 2004, as described in the Board's April 23, 2004, order.

MOTION TO RECONSIDER THE TEMPORARY STAY

Wireless Coalition also seeks reconsideration of the Board's order granting the Petitioners a temporary stay of their number portability obligations pending Board action on the petitions. In support of its motion to reconsider the temporary stay, Wireless Coalition asserts that 1) there are insufficient grounds for granting the stay, 2) the Board granted the stay without the use of or adherence to clear standards, and 3) the stay, as constructed, improperly shifts the burden of proof to objectors and offers little guidance to the parties as to how the stay might be lifted. For these reasons, Wireless Coalition requests the Board reconsider the implementation of the temporary stay in this docket. In the alternative, Wireless Coalition requests that the Board narrow its April 23, 2004, order and lift the temporary stay for those companies that are presently capable of providing local number portability (LNP). Each of these assertions will be described in greater detail below.

On May 25, 2004, ITA and RIITA filed a joint resistance to Wireless Coalition's motion to reconsider the temporary stay. Also on May 25, 2004, Alpine Companies and Coon Valley Companies filed a joint resistance to Wireless Coalition's motion.

On June 1, 2004, Wireless Coalition replied to the resistances filed by the Parties.

1. Sufficient grounds existed for granting the temporary stay.

Wireless Coalition contends that the Petitioners' need for a temporary stay of the federal number portability requirements was created by their late-filed petitions, the timing of which should serve to disqualify the parties from receiving a stay.

Wireless Coalition cites to an order issued by the Michigan Public Service Commission in support of its position.² Wireless Coalition also cites to a letter written by K. Dane Snowden, Chief of Consumer & Governmental Affairs Bureau for the FCC, which suggests that local exchange carriers have long known that they would be required to provide number porting to both wireline and wireless carriers.³

Wireless Coalition asserts that the parties have not provided an acceptable reason as to why their request for a stay was filed so close to the FCC's May 24, 2004, deadline.

The Petitioners respond that the FCC's wireline to wireless portability requirements were not clarified until November 10, 2003, and that since that time, the

² *In the Matter of the Application of Waldron & Ogden Telephone Companies*, Case No. U-13956 / U-13958, "Opinion and Order" (Feb. 12, 2004).

³ *Snowden Letter*, May 6, 2004.

Petitioners have been assessing what is necessary to achieve compliance with these requirements. The Petitioners also point out that the initial filing by ITA and RIITA on February 18, 2004, was more than 90 days ahead of the May 24, 2004, implementation deadline. The Petitioners state that there is no deadline for filing a suspension request pursuant to 47 U.S.C. § 251(f)(2) and, as such, the filings were not untimely and have been properly pursued.

The Board finds that the Petitioners did not unduly delay the filing of their petitions. The FCC did not specify a deadline for the filing of modifications or suspensions of the number portability requirements, thereby leaving the determination of timeliness with the state commissions. The Board finds that the Petitioners filed their petitions within a reasonable time after the number portability requirements were clarified further explanation regarding the timeliness of the filing is not required.

Moreover, the Board is not persuaded by the authorities cited by Wireless Coalition. The Michigan Public Service Commission order is addressed to the final merits of the proceeding, not to the question of whether the number portability requirements should be temporarily stayed (for a maximum of 180 days) while the agency considers the merits. These are two different questions; the Michigan order is addressed to the first and is silent on the second.

The same is true of the Snowden letter. Mr. Snowden encourages the states to "strictly apply" the statutory standard in making their final decisions and "to ensure that carriers seeking waivers demonstrate that they are on a path to compliance so that customers of these carriers will not be forever denied the rights their fellow

consumers enjoy." (Snowden Letter, pp. 1-2). These exhortations are directed at the Board's final decision in this docket, not at the question of whether the Board should maintain the status quo while making its decision.

2. The Board acted appropriately when granting the temporary stay.

Wireless Coalition asserts that the Board should have considered the requisite factors under 47 U.S.C. § 251(f)(2)(A) and (B) to determine whether to grant the Petitioners' request for a stay of the number portability requirements. Specifically, Wireless Coalition argues that while the Board considered the public interest factor of § 251(f)(2)(B), the public interest would be better served by denying the temporary stay. In addition, Wireless Coalition asserts that the Petitioners did not make an adequate showing of necessity as required by § 251(f)(2)(A) and the Board did not consider this factor when granting the Petitioners' request for a stay.

In support of its assertions, Wireless Coalition cites again to the Snowden Letter, encouraging a showing of extraordinary circumstances by LECs seeking waivers or modifications of number portability requirements. Wireless Coalition also suggests that generally accepted standards for providing interim relief require a showing of the likelihood of success on the merits and a balancing of harms. It is Wireless Coalition's position that the Petitioners' success on the merits of this petition is unlikely and that the balancing of the harms weighs against the granting of a temporary stay.

Alpine Companies and Coon Valley Companies assert that the Board acted appropriately pursuant to its authority provided by 47 U.S.C. § 251(f)(2). In addition, Alpine Companies and Coon Valley Companies state that Wireless Coalition failed to

demonstrate any harm resulting from this delay in implementation. Neither ITA nor RIITA specifically addressed this issue in their joint response to Wireless Coalition's motion.

The Board finds that the temporary stay was appropriately granted. The Petitioners made an adequate showing of necessity pursuant to 47 U.S.C. § 251(f)(2) when making their initial requests for suspension of the number portability requirements. The Snowden letter and the cases cited by Wireless Coalition are neither relevant nor authoritative to this particular question. Moreover, the universal standards for providing interim relief, as described by Wireless Coalition, would require the Board in this proceeding to reach a conclusion on the merits without allowing the Petitioners the benefit of due process. If the Board did not grant a temporary stay of the number portability requirements while this proceeding is pending, the Petitioners would be forced to comply with the requirements they seek to suspend without the opportunity of a hearing. Therefore, the Board finds that granting the stay in this proceeding is justified.

3. The stay properly applies the burden of proof.

Wireless Coalition asserts that the Board improperly shifted the burden to the objecting wireless carriers to demonstrate circumstances that support lifting the temporary stay in certain circumstances. Wireless Coalition claims that this shift is contrary to Congressional intent and is in contrast to the Snowden Letter. Wireless Coalition also asserts that the Board has not provided any guidance as to what is required to lift the temporary stay.

The Petitioners did not specifically respond to this issue in their resistances to Wireless Coalition's motion.

The Board finds that the Petitioners met their burden of proof with respect to the 180-day stay when they filed and completed their petitions. The Petitioners alleged both necessity and public interest arguments supporting suspension of the number portability requirements when they submitted their petitions, thereby making a prima facie case. As a result, the burden shifted to the objecting parties to offer contrary evidence or argument; the Board did not improperly initiate a shift of that burden.

As to the Wireless Coalition's complaint that the Board's order "also suffers the practical problem of providing no guidance as to what type of showing is required to lift the stay" (Motion, p. 8), the Board has not unduly limited or restricted any party's ability to seek lifting of the stay on any grounds; this appears to be more of a benefit than a problem. Moreover, the Board's decision is based on a finding that a temporary stay will serve the public interest; clearly a showing that the stay does not serve the public interest when applied to a particular company would support lifting the stay as to that company.

ALTERNATIVE MOTION TO LIFT, IN PART, THE TEMPORARY STAY

Wireless Coalition asserts that the temporary stay should be lifted immediately for members of the Coon Valley Companies. It is Wireless Coalition's position that the Coon Valley Companies utilize MITEL switches that are currently capable of providing LNP and, therefore, there is no justification for the temporary stay with

respect to these companies. Wireless Coalition also asserts that the Board should require RIITA, ITA, and the Alpine Companies to certify that their exchanges are not being served by a switch that is currently capable of providing LNP. In support of their position, Wireless Coalition again relies upon the Snowden Letter as well as the order issued by the Michigan Public Service Commission, both of which suggest that relief should be granted only where compliance is deemed more burdensome than the costs of similarly-situated providers.

In their responses to Wireless Coalition's motion, the Petitioners state that Wireless Coalition's motion ignores many of the issues raised in their initial petitions regarding costs related to the provision of intermodal number portability and the customer demand for this service. Coon Valley Companies also suggest that the purpose of this proceeding is to appropriately assess the cost-benefit analysis of requiring intermodal number portability at this time.

It appears Wireless Coalition is asking the Board to prematurely determine the final outcome of the proceeding as it applies to the companies that are providing service with a MITEL switch, or with another switch that is currently capable of providing LNP, before an opportunity for a hearing. Moreover, Wireless Coalition has not provided sufficient allegations of fact to effectively refute the issues raised in the Petitioners' initial petitions regarding the provision of number portability. While the MITEL Switches may be LNP-capable, this fact, by itself, does not respond to the Petitioners' claims that the costs of implementing intermodal number portability with MITEL Switches far outweigh the benefits. Therefore, the Board will deny Wireless Coalition's request to lift, in part, the temporary stay.

Finally, with respect to Wireless Coalition's request that the Board require certifications from RIITA, ITA, and Alpine Companies regarding their abilities to provide LNP at this time, the Board finds that Wireless Coalition may obtain this information more appropriately during the discovery process of this proceeding. Therefore, the Board will not, at this time, require that the Petitioners file such a certification in this proceeding.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Motion to Reconsider 180-Day Trigger Date" and the "Motion to Reconsider the Temporary Stay or, Alternatively, to Lift in Part the Temporary Stay," filed by the Wireless Coalition for Intermodal Portability on May 12, 2004, are denied as described in this order.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 21st day of June, 2004.